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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SCOTT ZACKY, as Trustee, etc., Plaintiff and Appellant, v. HADDON B. DILLON, Defendant and Respondent.	2d Civil No. B235722 (Super. Ct. No. 1242498) (Santa Barbara County)

We revisit a dispute between abutting landowners over the scope and extent of a driveway easement. In 2011, we affirmed a judgment in favor of the dominant tenement owner concerning its rights in a non-exclusive driveway easement. (*Zacky v. Dillon* (Jan. 6, 2011, No. B217352 [nonpub. opn.] (*Zacky I*).)[1] We also directed the trial court to clarify certain terms of its judgment on remand. It conducted further proceedings and issued its judgment following appeal. Appellant Scott Zacky, trustee of the owner of the dominant tenement (Zacky) appeals and contends that the trial court exceeded its jurisdiction on remand and in effect reversed *Zacky I*. We disagree and affirm.

[1] When this case was filed, the plaintiffs were Gregg Welsh, individually and as trustee of the Pearl Welsh Trust UTD, etc., and Laura Welsh. In 2007, the Welshes sold the property involved in this litigation to the Robert D. Zacky and Lillian D. Zacky Trust dated July 1988. Its trustee, Scott Zacky (Zacky), was substituted in as plaintiff in 2010. (*Zacky I*, at p. 1, fn. 1.)

BACKGROUND

Zacky owns the property at 1676 East Valley Road in Montecito (1676 EVR). Dillon owns adjacent property at 1666 East Valley Road (1666 EVR). These adjoining parcels resulted from the subdivision of "Mañana" in 1969 by Robert Neustadt and Maria Neustadt Spalding.[2] It was a friendly division which essentially kept the two parcels in the hands of the subdividing owner. At the same time, a long, rectangular driveway easement (56 feet by 146 feet) was created to serve as a "grand entrance" driveway to the parcel that became1676 EVR. As a result, 1676 EVR later became the dominant tenement and 1666 EVR, the servient tenement. (*Zacky I*, at pp. 2-3.)

In 1972, Robert Neustadt, his sister, Maria Spalding, and Robert's wife, Candice Taylor Neustadt, held title to 1676 EVR and 1666 EVR. Later that year, they sold both properties. On April 24, 1972, they deeded 1666 EVR to John and Pamela Williams, but reserved the driveway purposes easement for the benefit of 1676 EVR. The closing of the escrow for the sale of 1676 EVR to Alfred and Peggy Morgan was delayed pending the execution of several documents among the parties, including a deed granting an easement for utility and sewer purposes on the easterly 28 feet of 1666 EVR, in favor of 1676 EVR, which also recognized that the "'56 ft. driveway easement' [would be] a common driveway with [1666 EVR]." The documents were signed on July 6, 1972, and recorded on September 6, 1972. (*Zacky I*, at pp. 2-3.)

Historically, the sides of the driveway easement have been flanked with continuous mature hedges with "deeply embedded" fences. Near East Valley Road, the hedge and fence are open on one side to accommodate the 1666 EVR driveway. (*Zacky I*, at p. 3.)

In 2006, Dillon acquired a partial interest in 1666 EVR. In 2007, she acquired the remaining interest from Gulf Horizons, Limited, (Gulf) and became its sole record owner. In December 2006, Zacky's predecessors in interest brought an action

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[2] The detailed history is set forth in *Zacky I*, at pages 2-3.

against Dillon and Gulf, seeking to quiet title in favor of 1676 EVR to a driveway easement over 1666 EVR and obtain other related relief. (*Zacky I*, at p. 4.)

On May 22, 2009, the trial court issued its judgment (2009 judgment). The 2009 judgment quiets the title of 1676 EVR to the recorded driveway easement, and declares that such title includes a "reservation of easement 'for driveway purposes' [over 1666 EVR with] all such rights as are commonly allowed for a non-exclusive 56 foot wide grand entrance driveway [in] Montecito, including but not limited to ingress and egress, parking, washing of cars, recreations, installation of gates, paving and curbing, and all rights which they acquired from the after reformed reservation of easement, provided that reasonable access for driveway purposes is allowed to the servient tenement [1666 EVR], including access through any installed gates, so long as such use does not damage or unreasonably interfere with the grand entrance of the dominant tenement."

The 2009 judgment further declares that 1676 [EVR] shall "possess a prescriptive easement over 1666 . . . [EVR], including having the 'driveway' easement area fenced off from the house at 1666 [EVR], the construction and maintenance of the walls announcing the entrance to [1676 EVR], planting, . . . and maintaining mature and tall plantings at the edges of the 56 foot wide entrance, whether located within the 'driveway' easement boundaries or immediately adjacent thereto, . . . *provided that reasonable access for ingress and egress and access purposes is allowed to the servient tenement, including access through any gates subsequently installed*." (Italics added.) Another portion of the 2009 judgment uses similar language to recognize the right of 1676 EVR "to have the 'driveway' easement fenced off from the house at 1666 [EVR]." The 2009 judgment further provides for the reformation of specific deeds to reflect the rights of 1676 EVR in the easement.[3] Finally, it permanently enjoins Dillon and her

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[3] The judgment cites the easement recorded in "Instrument Number 20217 found in Book 2404, page 287 of Official Records of Santa Barbara County as recorded on June 2, 1972, as referenced in the Grant Deed to Plaintiffs [Gregg Welsh, et al.] which is Instrument Number 2004-0053601 recorded May 14, 2004 . . . ." As noted above, the Welsh plaintiffs are Zacky's predecessors in interest.

agents "from altering in any way any plants, shrubs, trees, improvements, paving, pipes or structures in [the] 'driveway' easement and prescriptive easement, and from impeding or impairing [the] access [of 1676 EVR] to that 'easement' . . . and from entering onto 1676 [EVR]."

Dillon appealed the 2009 judgment. On January 6, 2011, in *Zacky I*, this court affirmed that judgment but remanded the case with directions to clarify the rights of the respective parties to use the non-exclusive driveway easement, and to revise the provisions of the judgment concerning the installation of gates by 1676 EVR. (*Zacky I*, at pp. 13-14].)

As directed, the trial court conducted further proceedings. Prior to the first hearing, the court requested and received additional briefing by the parties. Counsel and the court discussed a proposal to identify two separate areas of the easement. The lower portion (Area 1) would begin at East Valley Road, and extend to the upper edge of the driveway that enters 1666 EVR. The much larger Area 2 would encompass the remainder of the easement, and end where it abuts 1676 EVR. Dillon's counsel advised the court that after the entry of the 2009 judgment, 1676 EVR installed a high rock curb and plants that blocked 1666 EVR's access to its back yard from Area 2. Counsel reminded the court that historically, there had been flat material, such as paving stones, dirt or lawn along the paved portion of Area 2, which had allowed access to the back yard of 1666 EVR by delivery and construction vehicles. The court later recognized that Dillon's "concern that the high rock curb, plantings and gate opener arm blocks or otherwise limits access to the backyard and gate [was] not unreasonable [and stated that the] clarified judgment should provide for 1666 EVR's limited but reasonable access to the backyard and gate in a manner that does not interfere with the 'grand entrance' use."

As directed by the trial court, Zacky lodged a proposed judgment with the court following the initial hearing. Dillon submitted objections and comments thereto. The court provided the parties the opportunity to present argument at a second hearing.

On July 1, 2011, the trial court issued its judgment following appeal, including an exhibit depicting Areas 1 and 2 of the driveway easement. The 2011

judgment grants both 1666 EVR and 1676 EVR non-exclusive and concurrent use of Area 1 "for all 'multifarious uses' to which driveways are put in Montecito," subject to specific restrictions.[4] It limits the use of Area 2 by 1666 EVR "to pedestrian and vehicular access to the back yard and gate of 1666 EVR provided that such use does not unreasonably interfere with 1676 EVR's use of Area 2 as its 'grand entrance.'"

The 2011 judgment further specifies that 1676 EVR is responsible for maintaining the entire easement. It grants 1666 EVR restricted rights to trim and maintain only the side of the hedge along the easement that faces west (toward the non-easement portion of 1666 EVR) "so long as such trimming and maintenance does not damage the health of the hedges [or] . . . reduce [their] height . . . ; and so long as the trimming extends no further east than the fence line historically embedded in the hedge." It also grants 1666 EVR a restricted right "to trim vegetation horizontally if such vegetation is outside of the reserved easement or the prescriptive easement created in the [2009 judgment]."

DISCUSSION

Zacky contends that the trial court acted in excess of its jurisdiction on remand because the 2011 judgment grants Dillon "a right of unlimited pedestrian and vehicular access to [1666 EVR] in Area 2 of the easement," and "conflicts with and effectively negates [Zacky's] right to have that area isolated from [1666 EVR] as adjudged below, and affirmed" in *Zacky I*, and thus reverses *Zacky I*. We disagree.

When an appellate court remands a case with directions requiring specific proceedings on remand, those directions are binding on the trial court. Any material variance from the directions is unauthorized and void. (See *Hampton v. Superior Court* (1952) 38 Cal.2d 652, 655-656.) On review, our task is to ascertain whether there was a

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[4] Such multifarious uses correspond with the rights commonly allowed for driveway purposes in Montecito, which include but are not limited to, "ingress and egress, parking, washing of cars, recreation, installation of gates, paving and curbing." (*Zacky I*, at p. 6.) As indicated above, the trial court recognized those rights in the 2009 judgment. (See *ante*, at p. 3.)

material variance in the trial court's execution of the prior appellate ruling. We will examine the appellate opinion as a whole to determine the intent of the judgment or order. We will not disturb a subsequent trial court judgment after remand for an immaterial departure from our directions in the prior appeal. (*In re Candace P*. (1994) 24 Cal.App.4th 1128, 1131-1132.)

Zacky claims that the 2011 judgment grants Dillon a right of unlimited pedestrian and vehicular access to Area 2 of the easement. We disagree.

The 2011 judgment does not grant Dillon "unlimited" access to 1666 EVR from Area 2. Zacky bases his claim on the following language in the 2011 judgment: "Use of Area 2 by 1666 EVR shall be limited to pedestrian and vehicular access to the back yard and gate of 1666 EVR provided that such use does not unreasonably interfere with 1676 EVR's use of Area 2 as its 'grand entrance.'" Dillon's access to Area 2 is not unlimited because it remains subject to several restrictive provisions of the 2009 judgment. For example, the 2009 judgment (as affirmed in *Zacky I*) prohibits Dillon from altering the plants, improvements, structures, and paving, that isolate the easement from the non-easement portion of 1666 EVR "in any way." The 2011 judgment does not materially change those prohibitions. It clarifies that 1676 EVR possesses all rights and responsibility to maintain the hedge and fence, and grants Dillon only restricted rights to trim the hedge.

Zacky further argues that the 2011 judgment "conflicts with and effectively negates [Zacky's] right to have [Area 2] isolated from [1666 EVR] as adjudged below, and affirmed" in *Zacky I*, and in effect reverses *Zacky I*. We disagree. This argument rests on the false premise that the 2009 judgment bars Dillon from accessing 1666 EVR from the portion of the easement that is now defined as Area 2, under any circumstances. It does not.

Under the 2009 judgment, and *Zacky I*, the right of 1676 EVR to have "the 'driveway' easement area fenced off from the house at 1666 [EVR]," is subject to the proviso "that reasonable access for ingress and egress and access purposes [be] allowed to the servient tenement [1666 EVR], including access through any gates subsequently

installed." That proviso reflects that under certain circumstances, 1666 EVR could use that easement, including that portion now defined as Area 2, to access the non-easement portion of 1666 EVR. The history of the easement supports such use.

The trial court's statement of decision, which it issued concurrently with the 2009 judgment, contains the following relevant findings concerning the history of the easement: "The Court finds that the Welsh family [1676 EVR] has never denied to Mrs. Dillon [1666 EVR] access to the easement. When she put a gate in the ancient fence separating her house from the easement, they did not complain. After all, the gate they proposed also would have permitted pedestrian access to 1666 in the easement area." The gate that Dillon installed connects the non-easement portion of 166with to Area 2 of the easement. *Zacky I* also recognizes the parties' prior use of the easement, including Area 2: "In 2005, during a heavy rain season, water drained across 1676 EVR onto 1666 EVR and caused substantial damage. Dillon obtained Welsh's permission to place a dumpster in the driveway easement, and to remove some of the hedge and fence to provide workers more direct access to the damaged section of 1666 EVR." (*Zacky I*, at p. 5.) During the proceedings below, the trial court stated that the judgment on remand "should provide for 1666 EVR's limited but reasonable access to the backyard and gate in a manner that does not interfere with the 'grand entrance' use."

Zacky also argues that the existence of an access gate in the fence along the easement in Area 2 is inconsistent with provisions in *Zacky I* and the 2009 judgment which provide that 1676 EVR can "fence off" the easement from the balance of 1666 EVR. We disagree. The trial court made the following significant finding in its 2009 statement of decision: "[F]or much longer than . . . five years . . . fences precluded access to the easement by 1666 [EVR] except at the very bottom by the cut off driveway to 1666 and where the fence was taken down by Mrs. Dillon, *but where she acknowledged the isolation by installing a gate rather than leaving the area open . . . .*" (Italics added.]) Thus, while recognizing the right of 1676 EVR to "fence off," the easement, the court found that the fence continued to isolate the easement from the remainder of 1666 EVR, even after Dillon installed a gate in it.

In summary, the trial court considered the relevant evidence, and clarified the parties' respective rights in the non-exclusive driveway easement. It did not reverse *Zacky I* or deviate from our directions on remand. (See *Hampton v. Superior Court, supra,* 38 Cal.2d at pp. 655-656.)

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

James Brown, Judge

Superior Court County of Santa Barbara

The Law Offices of E. Patrick Morris and E. Patrick Morris for Plaintiff and Appellant.

The Law Office of John Derrick and John Derrick for Defendant and Respondent.